IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 103

CITY OF CHICAGO,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

No. 104

PARMELEE TRANSPORTATION CO.,

Appellant-Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Appellees-Respondents.

Appeal From and Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF OF APPELLEES-RESPONDENTS UNDER RULE 41(5)

JEROME F. DIXON,
THEODORE J. ISAACS,
ALBERT J. MESKENOW,
Attorneys for Appellee-Respondent Railroad Transfer Service, Inc.,
231 So. La Salle Street,
Chicago, Illinois.

J. D. FEENEY, JR.,
AMOS MATHEWS,
Attorneys for Appellee-Respondent Railroad Companies,
280 Union Station Building,
Chicago 6, Illinois.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 103

CITY OF CHICAGO,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

No. 104

PARMELEE TRANSPORTATION CO.,

Appellant-Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Appellees-Respondents.

Appeal From and Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF OF APPELLEES-RESPONDENTS UNDER RULE 41(5)

Pursuant to Rule 41(5) appellees-respondents file this supplemental brief to point out the application to the instant cases of the decision of this Court in *Staub* v. *City of Baxley*, January 13, 1958.

There the Court held invalid under the First and Fourteenth Amendments an ordinance that required a permit

to solicit memberships in any dues paying organization and gave the Mayor and city council discretionary power to deny the permit. Several arguments advanced unsuccessfully by the City of Baxley are similar to contentions urged here by petitioner and appellant.

1.

The Court held that a licensing ordinance which on its face violates the Constitution may be attacked on Constitutional grounds without first applying for a license, citing, *inter alia*, *Smith* v. *Cahoon*, 283 U.S. 553, 562. *Smith* v. *Cahoon* held that a statute invalid on its face because it imposed, as in the instant case, an unconstitutional requirement of proof of public convenience and necessity, could be assailed successfully by a motor carrier who had not applied for a license under it.

The first requirement of the *Baxley* ordinance, preliminary to compliance with or benefit of any of its other terms, was an application to the Mayor and city council for a permit which they could grant or deny in their discretion. This first requirement in itself, the Opinion makes clear, was an unconstitutional demand because it called for submission to a scheme for unlawful control of constitutional rights. This first unconstitutional demand thus blocked the way to compliance with or benefit of any part of the *Baxley* ordinance.

The Court of Appeals in the instant cases held squarely in accord with *Staub* v. *City of Baxley* and similar earlier cases. It said, R. 211-212, 240 F. 2d p. 941:

> "We hold that if was unnecessary for Transfer to apply for licenses under the 1955 ordinance, because the issuance thereof unlawfully required a consent by

the city to the prosecution of Transfer's business *and was not merely a step in the regulation thereof.*" (Emphasis added.)

It was urged by the City of Baxley that appellant Staub had not adequately presented a Constitutional question under Georgia procedure in that she had not attacked "specific sections" of the ordinance. This Court rejected that contention, pointing out that—.

> "The several sections of the ordinance are interdependent in their application to one in appellant's position and constitute but one complete act for the licensing and taxing of her described activities."

Hence the first unconstitutional demand, submission of an application for a permit, pervaded the entire ordinance and forestalled consideration of the other "interdependent" sections of the ordinance, either as a matter of court procedure or by way of administrative handling by the Baxley authorities.

The *Baxley* case thus emphasizes that there is no merit in the claims of petitioner and appellant that appellees-respondents were required, before attacking the Constitutionality of the Chicago ordinance, to "exhaust their administrative remedies" by making an application under § 28-31.1 of the ordinance (R. 44-45) for a certificate of public convenience and necessity to conduct interstate commerce. Section 28-31.1 has all of the unconstitutional features of the *Baxley* ordinance plus several additional ones. And § 28-31.1, like the application provision of the *Baxley* ordinance, blocks the way to compliance with or administrative consideration of *any* of the other provisions of Chicago's Chapter 28 (R. 171) by demanding at the threshold submission to a scheme for the unlawful control of an applicant's Constitutional rights.

Comparison of the *Baxley* ordinance (footnote 1 of the Court's Opinion) with § 28-31.1 of the Chicago ordinance (R. 44-45) discloses that the features of the *Baxley* ordinance to which the Court directs particular attention because of Constitutional invalidity are present in § 28-31.1 and make it equally invalid.

Thus the Court said in the *Baxley* Opinion:

> "It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."

In conformity with the principles of the *Baxley* case expressed in many earlier similar decisions of this Court, the Court of Appeals said in part in holding § 28-31.1 of the Chicago ordinance unconstitutional:

> "2. We conclude that Transfer is an instrumentality used by Terminal Lines in interstate commerce and is subject to control of the federal government. We also conclude that the city can neither give nor take away such authority of Transfer to operate * * *" (R. 205, 240 F. 2d p. 938)

* * * * *

> "Even if § 28-4.1 and § 28-17 are violated, that fact does not empower the city to bar, or even suspend, the operations of Transfer. *Castle* v. *Hayes Freight Lines*, 348 U.S. 61. The fact that Hayes was operating trucks under a federal certificate of convenience and necessity, under Part II of the Interstate Commerce Act, does not distinguish that case in principle from

the present case in which Transfer is engaged in a federally authorized activity. See 49 U.S.C.A. § 302 (c) (2), *supra*." (R. 209, 240 F. 2d p. 940)

Citing *Buck* v. *Kuykendall*, 267 U.S. 307, which held invalid a statute similar to § 28-31.1, the Court of Appeals quoted the following from this Court's Opinion describing the statute, p. 315 (R. 211, 240 F. 2d p. 941):

> "* * * Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others, for the same purpose and in the same manner. * * * Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause. * * *"

The Court of Appeals followed the principles expressed now in *Staub* v. *Baxley* and its judgment should be affirmed. Compare *Staub* v. *Baxley* (1) with *Buck* v. *Kuykendall*, *supra*, 267 U.S. 307, and (2) with *Castle* v. *Hayes Freight Lines*, *supra*, 348 U.S. 61.

Respectfully submitted,

JEROME F. DIXON,
THEODORE J. ISAACS,
ALBERT J. MESEROW,
Attorneys for Appellee-Respondent Railroad Transfer Service, Inc.,
231 So. La Salle Street,
Chicago, Illinois.

J. D. FEENEY, JR.,
AMOS MATHEWS,
Attorneys for Appellee-Respondent Railroad Companies,
280 Union Station Building,
Chicago 6, Illinois.